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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION,
MINNESOTA PUBLIC UTILITIES COMMISSION,
and PEOPLES NATURAL GAS COMPANY,
a division of UtiliCorp United Inc.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the District of
Columbia Circuit

**BRIEF OF NORTHERN NATURAL-GAS COMPANY
IN OPPOSITION**

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January 17, 1992

RULE 29.1 LISTING

Northern Natural Gas Company's parent company, Enron Pipeline Company, is a subsidiary of Enron Corp. The following is a listing of subsidiaries (except wholly owned subsidiaries) of Enron Corp.:

Bannon International Limited

Citrus Corp.

Enron Arbross Ship Management Co. Ltd.

Enron/Dominion Cogen Corp.

Enron Oil & Gas Company

HT Gathering Company

Halton International Limited

Interruptores Especializados Lara, S.A.

Manufacturera de Aparatos Domesticos,
S.A. (MADOSA)

Milford Power Limited Partnership

Mojave Pipeline Company

Mundogas Orinoco Limited

Norelf Limited

Oasis Pipe Line Company

San Marco Pipeline Company

Seagull Shoreline System Transmission
Company

The Standard Shale Products Company

Tarumi Enterprises Ltd.

Teesside Gas Transportation Limited

Teesside Power Limited

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OCTOBER TERM, 1991

No. 91-798

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION,
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and PEOPLES NATURAL GAS COMPANY,
a division of UtiliCorp United Inc.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
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**On Petition for Writ of Certiorari to the
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**BRIEF OF NORTHERN NATURAL GAS COMPANY
IN OPPOSITION**

Northern Natural Gas Company ("Northern"), a respondent in the proceedings below, respectfully requests that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit in *South Dakota Public Utilities Com'n v. F.E.R.C.*, 934 F.2d 346, *reh. denied*, 941 F.2d 1233 (1991).

REASONS FOR DENYING THE WRIT

The court of appeals correctly found that the orders of the Federal Energy Regulatory Commission ("FERC" or "Commission") are supported by substantial evidence. The decision of the court below does not conflict with any decision of this Court or of any other court of appeals. This case raises no constitutional issues, nor does it present any important federal question. Accordingly, further review by this Court is not warranted.

1. Petitioners' essential claim is that they were denied "basic due process rights to present evidence and argument addressing the standard by which their case would be judged." (Pet. at 8.) Yet, Petitioners cannot deny that they were fully aware that this case would involve examination of the contract language, the parties' testimony of mutual intent, the course of dealing, the course of performance and trade usage. Petitioners had a full opportunity to present whatever evidence or argument they deemed to be relevant to these factors. As noted by the court below, Petitioners had "extensive discovery, including two opportunities for the protestors [Petitioners] to review all of Northern's relevant files. . . ." (App. at 14a.) Further, 14 witnesses presented by Northern and 56 witnesses presented by producers "were cross-examined at length, producing a transcript of about 5,400 pages." *Id.* After years of opportunity to conduct a search, Petitioners failed to produce a single witness. *Id.*

Petitioners' claim that they were denied due process rests on their allegation that the "historical intent" test and the "reconstructed intent" test are "diametrically opposed" because "[t]he first seeks to

determine the actual historical intent” while “[t]he second starts with the conclusion that there was no actual historical intent.” (Pet. at 10.) However, the court below viewed the reference to “historical intent” to be “a kind of shorthand,” stating that “courts themselves commonly use the language of historic intent in situations that are really ones of hypothesized or reconstructed intent.” (App. at 5a.) Under either formulation, Petitioners’ argument does not differ materially. With respect to “historical intent,” Petitioners’ argument is that the parties’ intent was limited to Commission-established ceiling prices; in the case of “reconstructed intent,” Petitioners’ argument is that if the parties had considered statutory ceiling prices, their intent would have been limited to Commission-established ceiling prices.

Petitioners’ claim that they were denied due process is a broad-brush claim that is totally unsupported—they failed to identify even one piece of evidence that they were precluded from introducing. Thus, regardless of whether the issue is viewed from the perspective of “historical intent” or “reconstructed intent,” the vast amount of evidence in the record remains the same. With respect to either perspective, the evidence supports the Commission’s orders, not Petitioners’ claim that the intent was limited to Commission-established ceiling prices. The individuals who negotiated, drafted, executed and administered the contracts at issue testified to an intent that was not limited to the Commission alone as the source of ceiling prices. As summarized by the court below, “the evidence ‘overwhelmingly’ showed that Northern and the producers intended the area rate clauses ‘to trigger payment of all generally-applicable ceiling

prices established by federal authority.' ” (App. at 14a), citing the ALJ’s Initial Decision. *See Northern Natural Gas Company*, 43 FERC ¶ 63,015 at 65,149, 65,169 (1988). The testimony as to the parties’ intent focused on the “generally-applicable ceiling price” without any limitation as to the source of the “federal authority.” Further, the overwhelming evidence as to contract language, course of dealing, course of performance and trade usage supports the Commission’s orders whether the perspective is “historical intent” or “reconstructed intent.”

2. Contrary to Petitioners’ assertion of conflict with other courts of appeals, the decision of the court below affirming the Commission is consistent with that of other courts which have considered the issue of the intent under an area rate clause. As noted above, the court below affirmed Commission orders finding that authorization to pay Natural Gas Policy Act (NGPA) ceiling prices was supported by the testimony of an intent “‘to trigger payment of all generally-applicable ceiling prices established by federal authority.’ ” (App. at 14a.) This is entirely consistent with the Fifth Circuit’s view that authorization to pay NGPA ceiling prices is shown by evidence of an intent to “permit escalation to the highest ceiling price permitted by governmental authority.” *Pennzoil Co. v. F.E.R.C.*, 645 F.2d 360, 369 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). It also is consistent with another case before the D.C. Circuit, in which the court stated that NGPA prices would be authorized on a showing that the intent was to “‘allow the contract price to float to the highest relevant ceiling set by regulatory authorities’ ” *Associated Gas*

Distributors v. F.E.R.C., 810 F.2d 226, 229 (D.C. Cir. 1987).

3. Petitioners' argument is limited to one narrow area—the parties' testimony of their mutual intent—and does not even address the other overwhelming evidence in the record. As recognized by the court below, the Commission affirmed an administrative law judge's decision that considered all relevant factors—"the contract language, the parties' testimony of mutual intent, their course of dealing, their course of performance, and trade usage." (App. at 14a.). Significantly, the court below noted that "[i]n affirming the ALJ, the Commission rested primarily on the evidence as to course of performance, which of course is probative *whether one thinks of the problem in terms of historical or reconstructed intent.*" (App. at 17a; emphasis added.) The court below, the Commission and the ALJ properly reviewed the extensive evidence in the record. Reexamination of the evidentiary and credibility findings made below is not a matter warranting review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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